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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 IMPRIMIS PHARMACEUTICALS, INC.,
12 Plaintiff,
13 vs.
14 OCULAR SCIENCE, INC.,
15 Defendant.

CASE NO. 16cv296 LAB (WVG)
**ORDER GRANTING LEAVE TO
DISMISS COUNTERCLAIMS**

16 Defendant and counterclaimant Ocular Science, Inc. on April 6 filed a motion either
17 to dismiss its second and third counterclaims, or for leave to amend its answer to omit those
18 two counterclaims. Because Imprimis had already filed an answer to the counterclaims,
19 Ocular Science could not voluntarily dismiss. The next day, Plaintiff Imprimis
20 Pharmaceuticals, Inc. filed a motion for partial summary judgment as to those two claims.
21 The hearing on both motions is Tuesday, May 30, 2017. Neither motion is opposed.

22 Imprimis' motion for partial summary judgment suggests that the reason Imprimis did
23 not consent to dismissal is because it wanted the claims dismissed with prejudice, and
24 because it wanted the right to seek an award of fees. Ocular Science, however, concedes
25 the two counterclaims are compulsory. That means the effect of Ocular Science's dismissal
26 of the two claims, even though without prejudice, will be that Ocular Science cannot raise
27 these same claims in any later action. *See Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320

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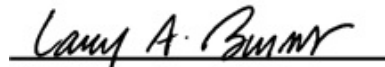
1 (9th Cir.1992).¹ And Imprimis has not identified any statute or other provision that would
2 entitle it to a fee award.

3 Because Ocular Science has made clear that it does not intend to pursue its second
4 and third counterclaims, and because Imprimis agrees they should be dismissed, Ocular
5 Science's motion to dismiss its claims is **GRANTED**. Ocular Science should promptly file an
6 amended answer, omitting the second and third counterclaims. B e c a u s e O c u l a r
7 Science's two counterclaims are being dismissed and will not be raised in future litigation, the
8 motion for partial summary judgment is **DENIED AS MOOT**.

9 The hearing on these two motions is **VACATED**.

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11 **IT IS SO ORDERED.**

12 DATED: May 25, 2017

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14 **HONORABLE LARRY ALAN BURNS**
15 United States District Judge
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26 ¹ Ocular Science's brief suggests the possibility that it might pursue them in some
27 other proceeding, if Imprimis' allegedly anticompetitive behavior continues or escalates.
28 Claims that have not yet accrued are obviously not being dismissed, so claims arising out
of Imprimis' future behavior would not be precluded in future actions. But by representing
that the two counterclaims were compulsory, and by not opposing the motion for partial
summary judgment, Ocular Science consented to dismissal of these two counterclaims, see
Civil Local Rule 7.1(f)(3)(c), and in effect has abandoned them.